No. [redacted]11

In the Supreme Court of the United States.

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WILSON SCOTT NORRIS, APPELLANT,

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THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

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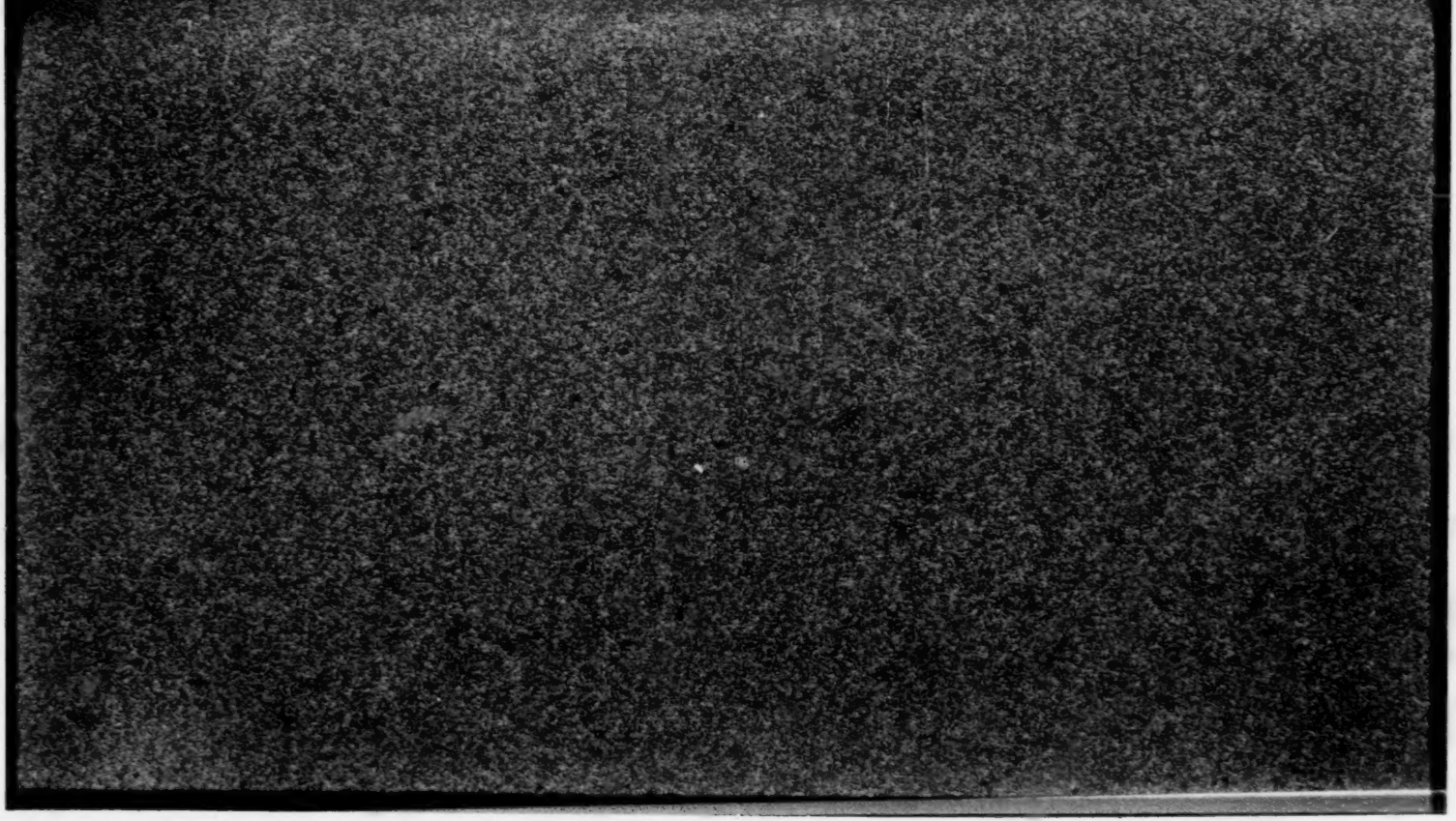

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STATEMENT.

Claimant filed this suit in the Court of Claims on February 23, 1916, to recover a $4 per diem salary as an inspector of customs at Baltimore from February 20, 1913, on which day he was discharged by direction of the Secretary of the Treasury, until May 20, 1916. (Rec. p. 2.) By an amended petition he sought to recover at the rate of $4 per day until September 30, 1917. (Rec. p. 3.) The Court of Claims dismissed his petition May 13, 1918. On appeal to this court a motion to remand for additional findings was made and sustained. The additional findings are now before the court.

Prior to August 24, 1911, the Secretary of the Treasury appointed a committee to examine into the customs business at Baltimore, including the personnel. This committee, on that day, made a report that appellant was 64 years old, and was not

a good inspector; that he had been suspended and reprimanded several times and suffered with rheumatism, and that in their opinion he should be dropped from the rolls. The Secretary of the Treasury approved this recommendation, and on February 19, 1913, directed the collector of customs as follows:

> W. Scott Norris, inspector, class 2, at $4 per diem, to be removed from the service, to take effect upon receipt of this communication, it appearing that he is not a good inspector, etc.

On February 20, 1913, the collector at Baltimore notified appellant that, by direction of the Secretary of the Treasury, his services as inspector were dispensed with and his position would be vacated on that day. Charges were not served on him, nor was he given an opportunity to answer.

After a delayed protest, the Assistant Secretary of the Treasury notified him that since he had been removed without receiving a written copy of the charges, if he so desired, the Treasury Department would reinstate him for the purpose of giving him a copy thereof. Appellant insisted that he be given the right to have charges preferred against him. The chief of the division of customs at Baltimore requested the Chief of Division of Appointments of the Treasury to reinstate appellant as a customs inspector so that he could be served with charges. On February 10, 1914, the Assistant Secretary by letter ordered

the reinstatement of appellant and directed that immediately upon taking the oath of office he was to be suspended from pay and duty and that charges were to be preferred against him, according to the recommendation of the committee above mentioned. The Civil Service Commission, at the request of the Treasury Department, issued the necessary certificate, and on February 20, 1914 appellant was "reinstated and appointed" a customs inspector at $4 per diem and was immediately suspended. On March 9, 1914, he answered the charges. The Assistant Secretary on April 25, 1914, in a letter to the collector replied to the answer, stating that the charges were not sufficient to have warranted dismissal of the officer, but stated further:

> Inasmuch, however, as there is no vacancy to be filled at the present time in the force of inspectors at your port, the department can not utilize Mr. Norris's services. The position of inspector was *created* for him in order that he might take the oath of office so that the charges could be tried. His services will therefore necessarily be dispensed with, which will be effective upon receipt of this letter by you, and the position *abolished*. He is eligible for reinstatement within one year, provided his services can be utilized, etc.

On June 6, 1914, as shown by the findings, there was no vacancy in the office of inspectors at the port of Baltimore. On February 18, 1915, plaintiff

again asked to be reinstated, but the findings do not show the reply of the Treasury Department.

Appellant was ready, willing, and able to perform the duties of customs inspector at Baltimore from the time of his dismissal.

CONTENTIONS.

The appellant's contentions are as follows:

First. That his removal from the service on February 20, 1913, was unlawful, and

Second. That his second removal on April 29, 1914, was unlawful because (*a*) he was acquitted of the charges brought against him, and (*b*) the officer directing the removal acted beyond the scope of his authority.

In answer to these contentions, the United States maintains:

First. That the Court of Claims has no jurisdiction in the premises.

If it has, the action is barred by laches.

Third. That, with reference to his second removal, (*a*) the removal was legally made by an officer who had authority to do so; (*b*) that, even though the appellant was unlawfully removed, yet he is not entitled to draw the salary because his place was filled by another who drew the salary during the period for which the appellant makes claim, and his office was abolished.

ARGUMENT.

I.

It does not appear that the Court of Claims has jurisdiction to give judgment for the salary of an office where the primary issue is the title to the office.

The Court of Claims is a court of limited jurisdiction, and the question is presented now whether the case at bar comes within the jurisdiction granted by Congress. Appellant comes into court expressly stating that he has no contract, express or implied, with the Government, but claims the salary of a Federal office as a right, on the theory that the salary is incidental to the office. The only question then to be decided, and the only issue, is the title to the office. To assume, for the purposes of the suit, that he is the *de jure* officer begs the whole question, for it is the only question calling for a decision. Has the Court of Claims jurisdiction in such case?

In a recent case (*United States* v. *The Holland-American Line*, decided Dec. 6, 1920) this court has had occasion to review the jurisdiction conferred on the Court of Claims by the Tucker Act (sec. 145, Judicial Code) and to comment on previous cases construing the extent of the jurisdiction conferred. Jurisdiction was denied for the reason that the claim presented sounded in tort.

The sole complaint in the present case is that the Secretary of the Treasury did not comply with the act of August 24, 1912, which provides a certain procedure where an officer is removed.

Where a public officer having the power of removal discharges or removes another wrongfully it is a tort. *McGraw* v. *Gresser* (1919) 226 N. Y. 57; *People ex rel. Walker* v. *Ahearn* (1910) 123 N. Y. Supp. 845.

That a public officer does not hold office or become entitled to its emoluments by virtue of any contract with the Government is sustained by the cases cited by appellant in his brief, page 16. The doctrine is the outgrowth of the principle enunciated by this court in construing the contract clause of the Constitution. *Butler* v. *Pennsylvania*, 10 How. 402. Consequently it is not a claim based on a contract express or implied.

This is not a claim arising under the Constitution. *Crenshaw* v. *United States*, 134 U. S. 99–104; *Burnap* v. *United States*, 252 U. S. 512.

By the process of elimination, the only possibility upon which jurisdiction can be predicated in this case is a "claim" founded upon a "law of Congress." The only law of Congress involved is the act of August 24, 1912, which provides that "the person whose removal is sought shall have notice of the same (the reasons for his removal) and of any charges preferred against him, and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same." But this act creates no claim. It does not purport to create a liability on the part of the Government, where one of its officers fails to comply with it.

Where jurisdiction is predicated on a law of Congress there must be some liability to pay somewhere, either contractual or otherwise. This contention is illustrated in the case of *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645–656, where it is said:

> *The law will imply a promise* to make the required compensation, where property to which the Government asserts no title is taken, *pursuant to an act of Congress.*

In the recent case of *Great Western Serum Company* v. *The United States* (decided December 6, 1920), Mr. Justice McReynolds said:

> There was no purchase of the destroyed articles or agreement therefor—none is claimed—and we think it quite clear that no contractual obligation by the United States to pay for them can be implied from the act itself.

The invasion of rights guaranteed either by the Constitution or the laws of Congress does not confer jurisdiction on the Court of Claims where no contract to pay can be implied. In the *Schillinger case*, 155 U. S. 163, Schillinger was guaranteed by a patent issued under the laws of Congress the exclusive right to manufacture, use, and sell the patented article. Nevertheless, Government officers appropriated his patent for the use of the Government. Jurisdiction was denied on the ground that the infringement was tortious. In the *Basso case*, 239 U. S. 602, Basso contended that

he had been deprived of his liberty without due process of law contrary to the rights guaranteed him by the Constitution. Jurisdiction was denied on the ground that if he had a claim it sounded in tort. All that can be said for the present case is that appellant had a right to remain in office until removed by a certain procedure. When he was removed, his rights were invaded by the officer who removed him, but no claim arose under any law of Congress. In other words, the foundation of his claim is the alleged unlawful act of the Secretary of the Treasury.

This discussion leads to the question of remedy in a case of this kind. This statute (act of Aug. 24, 1912) is the outgrowth of the common law, which is stated by High as follows (Extraordinary Legal Remedies, 3d Ed., sec. 68):

> The general common-law rule that to warrant the removal of an officer specific charges should be brought against him, and all witnesses in the matter should be sworn, is held applicable even to offices unknown to the common law and created by statute, and the disregard of this rule in the amotion of an officer may authorize the aid of mandamus to compel his restoration.

In *Sawyers case*, 124 U. S. 200–212, Mr. Justice Gray said:

> The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by *certiorari*, error or appeal, or by mandamus,

> prohibition, or information in the nature of a writ of *quo warranto*, according to the circumstances of the case and the mode of procedure established by common law or by statute.

This act of August 24, 1912, does not abrogate the rule that the power of appointment carries with it the power of removal. It simply provides a mode of procedure where the power is exercised. If that procedure is omitted or irregularly exercised, the amoted officer's duty is to appeal to a court having jurisdiction to review procedural matters. If the removing authority omits the prescribed procedure, it is a matter which affects his jurisdiction to act, so to speak, and it is a proper matter to be brought to the attention of a court having the power to bring the appointing power before it in order properly to inquire into the acts or omissions complained of. Basso (*Basso* v. *United States, supra*) complained that the court which deprived him of his liberty was without jurisdiction. So in this case the only complaint can be an attack on the jurisdiction of the Secretary of the Treasury in removing him. Where is there any grant of jurisdiction to the Court of Claims enabling it to review the acts of the Secretary of the Treasury?

An inspection of the cases relied on (p. 16) by appellant to show that he is entitled to the salary of the office as an incident thereof will show that in most cases the officer, by certiorari or otherwise, first established his title to the office. Apparent

exceptions, as the *Wickersham case,* 201 U. S. 390, in this court are grounded on another principle, namely, that an officer can not be removed by a subordinate officer who has neither the power of appointment nor removal. Mr. Justice Day carefully restricted the issue in that case by saying:

> Whether he could have been summarily removed or suspended by the President or other competent authority is not the question now before the court, but the question is whether the employee during his wrongful *suspension* by a subordinate officer is entitled to the compensation provided by law.

The present case is not one of suspension. It is an out-and-out removal by competent authority, and the question of whether or not the incumbent could be restored to office is a question to be determined by a court having the power to review the proceedings had at the time of his removal, and the power to compel his restoration in the event that the court should come to the conclusion that the officer was not removed in compliance with the procedure laid down by law.

Unless the title to the office is first tested by mandamus or other appropriate remedy by a court invested with jurisdiction to try title to an office, the situation is anomalous. An officer who is removed by the Secretary of the Treasury, the appointing authority, is no longer carried on the pay roll. He is not actually in office and performs none of the functions or duties of the office. Nor could he perform if he were so inclined. The moneys ap-

propriated by Congress for the payment of customs inspectors are paid to *de facto* officers or for other customs expenses. Nevertheless an inspector, unknown to the records of the Government, sues for the salary of such an office on the assumption that he is a *de jure* officer. If he should prevail, he would not be restored to the office. On the contrary, he would be in better position than if he were performing the duties of the office, for having been adjudicated for the purposes of a suit in the Court of Claims a *de jure* officer, he could continually sue for the salary of the office so long as he lived and held himself ready and willing to perform. So long as he bestirred himself to sue each six years, he could recover on the theory advanced that, being a *de jure* officer, the salary followed incidentally.

Our conclusion is that the Court of Claims has no jurisdiction in the premises, first, because the action is not *ex contractu*. If it were, the court would have jurisdiction under the Tucker Act, but the usual defenses applicable by the law of employer and employee would be available to the Government. The action would be essentially one for the breach of contract of employment, and the judgment would be conclusive and would not leave the way open for a series of suits which could be maintained so long as the officer enjoyed his exceptional status as a quasi *de jure* officer. Secondly, this suit attempts to hold the sovereign liable for the misfeasance in office of one of its officers, whereas a writ should issue on authority of the sovereign to

determine the relationship between the complainant and the Secretary of the Treasury. The Court of Claims has no such jurisdiction; neither has it jurisdiction by certiorari or similar remedies to review the acts of the Secretary. We submit that the action can not be maintained in the Court of Claims.

II.

Even if appellant was improperly removed from office he delayed bringing any action for the period of two years, which bars him because of laches.

If, as it is urged, a suit for salary is not based on contract, but upon the legal right to the office, it follows that the issue in such suit is the title to the office. The amount of salary due is a mere matter of accounting. But it has been held by this court that jurisdiction to determine the title to a public office belongs exclusively to courts of law and is exercised either by certiorari, error, or appeal mandamus, prohibition, quo warranto, or information in the nature of quo warranto. *Sawyer's case* 124 U. S. 200; *White* v. *Berry*, 171 U. S. 366–377. So if the Court of Claims has jurisdiction to consider a suit of this kind, the remedy must be in the nature of one of the foregoing, whatever the form of the suit. But actions like mandamus, though at law, are equitable in their nature and are not governed by the statute of limitations. *Ex rel Arant* v. *Lane*, 249 U. S. 367. In this last case a delay of twenty months in bringing an action to be reinstated was fatal. It

logically follows that appellant by delaying his action in this case lost by laches his right to determine the title to his office.

III.

The second removal of appellant on April 25, 1914, was lawfully made by an officer having the power of removal after strict compliance with the act of March 24, 1912, and immediately upon removal of appellant the office to which he had been reinstated and appointed was abolished.

The findings show that after appellant prevailed upon the Treasury Department to reinstate him for the purpose of having charges preferred against him, an office was created by the Secretary of the Treasury to which he was appointed and the office was immediately abolished after the charges had been heard. It is clear that by accepting appointment to the new office appellant abandoned the former office, even if it should be held that because of the disregard of the act of August 24, 1912, he was never legally removed, and therefore *de jure*. So whatever rights he had at the time he was dismissed from the service in 1913 were ended when he accepted appointment to another office in the winter of 1914. (Act of May 10, 1916, ch. 117, sec. 6, 39 Stat., 120, amended Aug. 29, 1916, ch. 417, 39 Stat., 582; U. S. Comp. Stat., 1918, sec. 3230a).

Appellant was removed on April 25, 1914, from this second office to which he had been appointed

after he insisted upon having his case reviewed by the Treasury Department. The removal, it appears from the findings, was directed by the Assistant Secretary of the Treasury, and the point is made by the appellant that that officer was without power to effect the removal and consequently that no removal ensued, although it appears from the findings that the procedure prescribed by statute was strictly adhered to.

This contention of the defendant has been frequently made and has always been overruled. It must be apparent that in any of the great departments of our Government there is a body of detail work which must be performed by persons other than the head of the department. The statutes make provision for Assistant Secretaries of the Treasury.

Revised statutes, section 161, provides:

> The head of a department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, *the distribution and performance of its business,* and the custody, use, and preservation of the records, papers, and property appertaining to it.

Revised Statutes, section 245, provides:

> The Assistant Secretaries of the Treasury shall examine letters, contracts, and warrants prepared for the signature of the Secretary of the Treasury, *and perform*

such other duties in the office of the Secretary of the Treasury as may be prescribed by the Secretary or by law.

In *McCollum* v. *United States* (17 Ct. Cls. 92, 101), the court, speaking of the general duties of assistants, said:

> The duties of these assistants are generally not specifically defined by law, but are left to the direction and regulation of superior officers Such assistants are supposed to have the confidence of those immediately above them, and to be officially engaged in carrying out the will of their principals in the details of the work of the department or bureau in which they are employed.
>
> When their acts, *decisions,* or directions are reduced to writing, signed by them in their official capacity, filed or recorded among the archives of the department, and do not appear to have been revoked, annulled, or modified by the head of the department or bureau, they must be held, in the absence of fraud, mistake, or irregularity, to have been done within the scope of the authority of the assistant, and to be as binding on the Government as though expressly ordered by the superior. *Especially is that so when copies of such written documents are sent to this court by the head of the department in which they are found, without objection on his part to their having been made in the due and regular course of business under his control.* [Italics ours.]

In *Chadwick* v. *United States* (3 Fed. R. 751), a suit to recover moneys withheld by a collector of internal revenue, objection was made to the admission of a transcript certified by an Assistant Secretary of the Treasury. The court (p. 756) said:

> Assistant Secretaries in the Treasury Department are appointed under the authority of an act of Congress, with power to perform such duties in the office of the head of the department as he may prescribe or as the law directs. * * * Nothing appearing to the contrary, the legal presumption is that the certificate was made in pursuance of a lawful authority. * * *

In *Adams* v. *United States*, 24 Fed. R. 348, the court said (p. 351):

> An " assistant " is one who stands by and helps or aids another, * * *. Any duty pertaining to his office which the Secretary may prescribe for him, such assistant may do. * * * But I think that an act done by the assistant and within the authority and power of the department, must, until the contrary appears, be presumed to have been done under the direction of the Secretary of the Treasury.

In the case of *Shillito Co.* v. *McClung* 51 Fed. R. 868, it was contended that an Assistant Secretary of the Treasury had no authority to decide an appeal in a customs case. But the Circuit Court of Appeals, consisting of Judges Jackson and Taft,

after an exhaustive review (p. 871) of the entire situation and full citation of authority, said (p. 872):

> We think these authorities state the correct principle to be applied to the action of the Assistant Secretary in the present case. If not appearing to the contrary, his authority to decide the appeal must be presumed.

In *re Way Tai*, 96 Fed. R. 484, it was contended that an Assistant Secretary of the Treasury could not hear and determine appeals in Chinese exclusion cases, but the court (p. 486) said:

> It may be assumed that the Secretary has conferred upon the Assistant Secretary who acted in the present case the authority to act in the matter of the appeal of the petitioner's case, and it would seem that, under the statute above quoted, the authority is one that may be delegated.

In *Parish* v. *United States* 100 U. S. 500, the Supreme Court (p. 504) said:

> The Office of the Surgeon General is one of the distinct or separate bureaus of the administrative service of the War Department. It has been found, in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence, statutes have been made creating the office of assistant secretaries for all the heads of departments.

> It would be a very singular doctrine and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department.

See also *Turner* v. *Seep*, 167 Fed. R. 646, 649.

In 18 Op. Atty. Gen. 432, it is held that section 439, Revised Statutes (similar in all respects to R. S., 245), empowers the Secretary of the Interior:

> to make the assistant * * * his deputy in all things. * * * So long as the powers delegated to the Assistant Secretary of the Interior by his superior remain unrevoked, the authority of the former is coordinate and concurrent with that of the latter.

The conclusions reached in the above authorities are equally applicable here. The court can take notice that the Customs Division of the Treasury Department is in itself a business of such magnitude as to require the complete attention of one executive and that an Assistant Secretary is always assigned in charge of customs. Acquiescence in the acts of the Assistant Secretaries by the Secretary is in itself sufficient in law to indicate adoption on his part. The hair-splitting contention of appellant that the letter authorizing removal was not directed by the Secretary himself simply amounts to the assertion that the Assistant Secretary before signing the letter did not type at the end thereof, "by direction of the Secretary." In either event, the Secretary himself would probably have known

nothing of the matter, and to argue that these words have magic is to forget substance for form.

But the appellant argues that even if the acts of the Assistant Secretary were those of the Secretary, still the conclusion reached was that the charges were not sustained. It can not be denied that on this occasion there was compliance in every detail with the act of August 24, 1912. Appellant was dismissed, and the courts will not review the reasons. *Keim* v. *United States*, 177 U. S. 290. At best the act only guarantees that the officer is privileged to have charges preferred against him and an opportunity to answer them. That is the only qualification, even if the act is mandatory on the power to dismiss. If the appointing power then exercises the right to dismiss, even if he be personally of the opinion that the charges are not sustained, the dismissal is nevertheless absolute. The procedure required by the statute was complied with, which satisfies the law and prevents interference by the courts.

Regardless of the conclusion reached at the time of the second removal, the office which appellant held was abolished, and there was no vacancy for him in the service. It is elementary that the sovereign may abolish an office and put an end to the services. In *Crenshaw* v. *United States*, 134 U. S. 99, at 108, Justice Lamar said:

> Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sov-

ereignty at will; and one legislature can not deprive its successor of the power of revocation. *Butler* v. *Pennsylvania, supra,* 10 How. 402; *Stone* v. *Mississippi,* 101 U. S. 814; *United States* v. *McDonald,* 128 U. S. 471–473.

Congress, in the case of inspectors of customs, has delegated to the Secretary of the Treasury all of the details of appointment and judgment as to the number of offices of inspectors. See act of March 2, 1799 *ante* and various appropriation acts cited under footnote 1. No attempt has ever been made by Congress to fix the number of offices to be filled. The Secretary of the Treasury has been required from time to time to reorganize the customs service. See act of March 4, 1909, chap. 314, 35 Stat. 1065, and also act of August 24, 1912, chap. 355, 37 Stat. 434, U. S. Comp. Stat. 1916, sec. 5327. On these occasions he reported his schedules to Congress upon which lump-sum appropriations were based. It was entirely within his discretion to fix the number of employees needed for the service, which, on the theory that there is an office of inspector, must be synonomous with fixing the number of offices.

In this case, an office was created by the Secretary, to which appellent was appointed. He was suspended from that office pending charges, and when he was removed the office was abolished by the Secretary, or his representative, the Assistant Secretary. Consequently, the office ceased to exist at the very time that appellant was removed, so that

he can not now sue for a salary as incident to an office where there was no office.

IV.

Where a de facto officer performs the services and receives the emoluments of an office the de jure officer can not recover the salary.

It is now the general rule by weight of authority and a rule which is growing in favor that payment to a *de facto* public officer of the salary of the office while he is in possession is a valid defense to an action for salary and prevents recovery by the *de jure* officer.

In the case of *Dolan* v. *Mayor of New York,* 68 N. Y. 274–280, the court said:

> It is clear that if the city could rightfully pay the salary of Keating during his actual incumbency, and has paid it, it can not be required to pay it again to the plaintiff. We are of opinion that payment to a *de facto* public officer of the salary of the office, made while he is in possession, is a good defense to an action brought by the *de jure* officer to recover the same salary after he has acquired or regained possession.

Lee v. *Wilmington,* 1 Marvel (Delaware) 65, contains a full discussion of the whole question, the conclusion of the court being in accord with the principle above stated.

Coughlin v. *McElroy,* 74 Conn. 397, also reviews the authorities and finds them in accord with the above principle.

See also:

Brown v. *Tama Co.*, 122 Iowa, 745.
Saline County Commissioners v. *Anderson*, 20 Kans. 298.
Wayne County v. *Benoit*, 20 Mich. 176.
Parker v. *Dakota County*, 4 Minn. 59.
Hunter v. *Chandler*, 45 Mo. 452.
McDonald v. *Newark*, 58 N. J. Law, 12.
Samuels v. *Harrington*, 43 Wash. 603.
State v. *Moores*, 70 Nebr. 48, 57.
Throop Public Officers, 510.

In a note to the case of *Nall* v. *Coulter*, 4 Ann. Cas. 671 (117 Ky. 747), the authorities are reviewed and the reviewer finds the weight of authority to be overwhelmingly in favor of our principal proposition. The recent cases of *People* v. *Burdett*, 283 Ill. 124, and *People* v. *Schmidt*, 281 Ill. 211, show that the Supreme Court of Illinois, although at one time it took a contrary view of the subject, has now overruled its former decisions and is in accord with the weight of authority. See also Mechem on Public Officers, section 332.

There is no specific finding in the record as to when appellant's office was filled, but the findings do show that when he was reappointed an inspector on February 20, 1914, for the purpose of having charges preferred against him, there was no vacancy in the office of inspector at Baltimore. An office was created for him and immediately abolished. Findings also show that subsequent to that time there was no vacancy in the office of inspector

at Baltimore. Consequently, it logically follows that the office which he held at the time of his earlier dismissal—that is, February 20, 1913—had been filled by another appointee prior to February 20, 1914. For the period subsequent to that time it is quite clear there can be no recovery. But shortly after appellant was dismissed the first time a report of the permanent organization of the customs service was reported to Congress on March 3, 1913. Thirty-three inspectors were provided for the district of Maryland, which includes the port of Baltimore. It is the necessary presumption that these offices were filled at the time this reorganization was made, for the presidential order provided that:

> All persons now in the classified Civil Service whose employment may be discontinued by reason of this reorganization shall be retained upon the list of eligibles for appointment to fill any vacancies hereafter occuring in the customs service.

In addition to this presumption the Court of Claims has found as a fact in the *Nicholas case*, No. 47, that these positions were filled on March 3, 1913, by persons appointed by the Secretary of the Treasury. Under the authorities therefore, there can be no recovery for the salary claimed as incidental to this office where it is shown that, conceding the appellant to be a *de jure* officer for the purpose of argument, a *de facto* officer has filled the position and has been paid the salary of the office.

CONCLUSION.

In conclusion it is respectfully submitted that the Court of Claims has no jurisdiction under the Tucker Act to adjudicate a case of this nature; that, if that court has such jurisdiction from the nature of the case, the right of action is barred by laches where the claimant negligently fails to prosecute his case promptly; that the second removal made on April 25, 1914, was absolute and lawful for the reason that the provisions of the statute were complied with and the act of the Assistant Secretary of the Treasury was the act of the Secretary; and, finally, payment having been made to a *de facto* officer, the *de jure* officer can not recover for the period when said payment was made.

FRANK DAVIS, JR.,
Assistant Attorney General.

WILLIAM D. HARRIS, *Attorney.*

FEBRUARY, 1921.

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